

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of

Numbering Resource Optimization

To: The Commission

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CC Docket No. 99-200

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COMMENTS OF WINSTAR COMMUNICATIONS, INC.

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## SUMMARY

Winstar shares the goal of the FCC, the state commissions, the telecommunications industry, and the consumers that numbering resources be utilized as efficiently as possible. The Commission adopted a number of important number optimization measures in the *Report and Order*, including, among other things, uniform national definitions for categories of numbering usage, mandatory and enforceable reporting requirements, streamlined reclamation procedures, and number pooling. These measures will fundamentally change the way numbering resources are utilized, and thus the issues upon which the FCC must focus to ensure that numbers are utilized efficiently. Winstar urges the FCC carefully to consider the effect these new measures will have when it evaluates the measures proposed in the *Further Notice*.

As an initial matter, Winstar submits that it may no longer be necessary to verify a carrier's need for growth codes in light of the measures the FCC adopted in the *Report and Order*. Before the *Report and Order*, it was crucial that the FCC verify a carrier's need for growth codes because it was very difficult, if not impossible, to detect stockpiling and reclaim unused numbers. However, the measures the FCC adopted in the *Report and Order* will prevent carriers from stockpiling numbers because the FCC, working with NANPA and the state commissions, will be able to detect and reclaim unused codes within six months.

Winstar nonetheless continues to support a requirement that carriers demonstrate their need for additional numbering resources when they apply for growth codes. However, the FCC must carefully design any need-verification test to ensure that it does not harm competition by discriminating against particular classes of carriers or prevent carriers from having timely access to adequate numbering resources. First, utilization rates cannot be the only criterion of a need-verification test; carriers must be allowed to obtain additional numbering resources upon

demonstration of genuine need despite not meeting the relevant utilization threshold. Second, the utilization threshold must be two-tiered to reflect important differences between new entrants and carriers who have been in a market for three or more years. Third, the utilization threshold must be rate center-based, not NPA- or nationwide-based. Fourth, the utilization formula must be amended or the utilization threshold must be lowered to reflect numbering categories that do not vary between carriers based on their relative efficiency. Finally, the FCC should not authorize state commissions to vary utilization rates or the means for calculating these rates from state to state.

In its earlier comments, Winstar expressed its belief that the current grant of CMRS forbearance from pooling was both unnecessary and discriminatory in favor of the CMRS industry segment. Although our position in this matter has not changed, we shall not further question the existing grant of forbearance. Nonetheless, we must contend, in the strongest possible terms, that any further delay is unnecessary at best and outrageously discriminatory at worst.

Winstar also continues to oppose vigorously any form of “pricing for numbering resources,” as did the majority of commenters who responded to the *Notice of Proposed Rulemaking* in this proceeding. Not only are “market-based allocation” systems – auctions – contrary to the plain language of the 1996 Act, they are also inconsistent with the FCC’s goal of “ensur[ing] that all carriers have the numbering resources they need to compete.” Perhaps more importantly, however, auctions would have little to no effect on the efficiency with which numbering resources are utilized, yet they would create enormous administrative burdens and have the potential unnecessarily to raise the costs of telecommunications services for end users. Winstar urges the FCC to rely instead on the numbering optimization measures it has adopted in this proceeding.

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TO: The Commission

**COMMENTS OF WINSTAR COMMUNICATIONS, INC.**

Winstar Communications, Inc. ("Winstar"), by its attorneys, hereby respectfully comments on the Federal Communications Commission's ("FCC" or "Commission") *Further Notice of Proposed Rulemaking* released on March 31, 2000 in the above-captioned proceeding.<sup>1</sup> Winstar is a wireline competitive local exchange carrier ("CLEC"), using fixed wireless technology, with operations throughout the top 50 Market Service Areas ("MSAs") in the United States. The timely availability of numbering resources is crucial to the future of competition and all telecommunications carriers, including Winstar. Accordingly, Winstar has a direct interest in this proceeding.

As explained in more detail below, Winstar respectfully submits that the FCC should (1) allow carriers to obtain growth codes when they either meet a rate center-based utilization threshold or demonstrate genuine need without regard to utilization rate; (2) adopt a two-tiered utilization threshold to distinguish between new entrants and carriers with a market presence of three or more years; (3) amend the utilization formula or lower the proposed utilization threshold; (4) ensure that any utilization threshold is rate center-based and does not vary from state to state (5) require non-LNP-capable carriers to implement pooling as soon as

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<sup>1</sup> *Numbering Resource Optimization*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 99-200, FCC 00-104 (rel. March 31, 2000) ("*FNPRM*").

they become LNP-capable; and (6) reject proposals to auction numbering resources. These steps are necessary to ensure that the proposed numbering optimization measures do not have a discriminatory effect on particular classes of telecommunications carriers or consumers.

**I. THE FCC SHOULD ALLOW CARRIERS TO OBTAIN GROWTH CODES WHEN THEY MEET A UTILIZATION THRESHOLD OR DEMONSTRATE GENUINE NEED WITHOUT REGARD TO UTILIZATION RATE**

In the *FNPRM*, the FCC asks for comment on what specific utilization threshold non-pooling carriers must meet to qualify for growth codes.<sup>2</sup> The FCC tentatively concludes that there should be a nationwide utilization threshold, and that this threshold should increase 10% annually from an initial point of 50% until it reaches 80%.<sup>3</sup> The FCC also proposes to require carriers to meet a specific rate center-based utilization threshold for the rate center in which it is seeking additional numbering resources.<sup>4</sup> Finally, the FCC seeks comment on whether state commissions should be permitted to set the rate center-based threshold within any range adopted by this FCC.<sup>5</sup>

As an initial matter, Winstar submits that it may no longer be necessary to verify a carrier's need for growth codes in light of the measures the FCC adopted in the *Report and Order*. The purpose for requiring applicants to provide data to support their need for growth codes is to prevent "the building up (or "stockpiling") of numbers and carrying of excessive inventories."<sup>6</sup> Before the *Report and Order*, it was crucial that the FCC verify a carrier's need for growth codes because it was very difficult, if not impossible, to detect stockpiling and

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<sup>2</sup> *Id.* at ¶248.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at ¶101 (citing *Notice*, 14 FCC Rcd at 10348).

reclaim unused numbers. However, the measures the FCC adopted in the *Report and Order* will prevent carriers from carrying excessive inventories of numbers. Specifically, the uniform definitions of categories of numbering usage, the mandatory and enforceable reporting requirements, the sequential assignment requirement, the streamlined reclamation process, and the expected deployment of mandatory audit practices will prevent carriers from stockpiling numbers. Carriers will have no incentive to request growth codes that they do not need, because the FCC, working with NANPA and the state commissions, will be able to detect and reclaim unused codes within six months. Therefore, it may not be necessary to require carriers to submit data to support their need for growth codes.

Winstar nonetheless continues to support a requirement that carriers demonstrate their need for additional numbering resources when they apply for growth codes. However, the FCC must carefully design any need-verification test to ensure that it does not harm competition by discriminating against particular classes of carriers or prevent carriers from having timely access to adequate numbering resources. First, utilization rates cannot be the only criterion of a need-verification test; carriers must be allowed to obtain additional numbering resources upon demonstration of genuine need despite not meeting the relevant utilization threshold. Second, the utilization threshold must be two-tiered to reflect important differences between new entrants and carriers who have been in a market for three or more years. Third, the utilization threshold must be rate center-based, not NPA- or nationwide-based. Fourth, the utilization formula must be amended or the utilization threshold must be lowered to reflect numbering categories that do not vary between carriers based on their relative efficiency. Finally, the FCC should not authorize state commissions to vary utilization rates or the means for calculating these rates from state to state.

**A. Carriers Must Be Allowed To Obtain Growth Codes Upon Demonstration Of Genuine Need Without Regard To Utilization Rate.**

Utilization rates cannot and should not be the only criterion of a need-verification test, as Winstar explained in its comments to the *Notice of Proposed Rulemaking*. Although utilization thresholds can provide one means for verifying need, there are many circumstances where carriers have a genuine need for additional numbering resources despite having a relatively low utilization rate. Such needs can occur in high growth rate areas or in situations where a carrier has an insufficient inventory of available numbers to meet an increase in demand for service. Increases in demand for service can be caused by a single order from a large end user, the introduction of a new service, a successful marketing campaign, or competition to serve a new subdivision, office park or campus. Under these circumstances, carriers must be allowed to obtain additional numbering resources upon demonstration of genuine need despite failure to meet the relevant utilization threshold. A carrier could demonstrate genuine need in numerous ways, including, but not limited to, documentation of (1) specific customer requests; (2) verifiable – but previously unanticipated – increases in customer demand; (3) planned roll-out of a new product or service that requires numbering resources; or (4) end user or service provider equipment limitations that make additional resources necessary.

Winstar believes that the procedure outlined above is the only solution which ensures that “no class of carrier or consumer is unduly favored or disfavored by [the Commission’s] optimization efforts.”<sup>7</sup> A need-verification test based solely on a utilization threshold unfairly favors larger carriers. For example, a new entrant who has a total of 10,000 numbers and a utilization rate of 20% would have far fewer than 8,000 numbers available for

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<sup>7</sup> *Id.* at ¶3.



assignment to end users. This new entrant would not qualify for a growth code if the FCC adopted a need-verification test based solely upon a 50% utilization threshold. However, the new entrant would not be able to fulfill a request from a large customer for 10,000 lines to populate a new Private Branch Exchange (“PBX”) or business campus. By contrast, an incumbent carrier who has a total of 6.4 million numbers, as is the case for the incumbent in New York City, would still have approximately 3.2 million numbers at a 50% utilization rate. In this instance, the incumbent would have far more than enough numbers to fulfill the request, and thus would receive the contract. Furthermore, the incumbent would qualify for a growth code despite having 3.2 million numbers would qualify for a growth code while the CLEC, with a paltry 8,000 numbers, would not.

The FCC itself noted the difficulty of selecting a fair and non-discriminatory uniform threshold when it adopted a threshold contamination level for mandatory donation of thousands-blocks to a number pool. The FCC concluded that it “should adopt a uniform contamination threshold for all carriers to avoid a discriminatory impact on any particular segment of the telecommunications industry,” but it allowed carriers to retain a sufficient number of thousands-blocks to meet its six-month projection forecast, as determined by the carrier’s MTE worksheet.<sup>8</sup> Therefore, any need-verification test based on a utilization threshold that the FCC adopts must incorporate a simple and streamlined method for carrier to demonstrate genuine need for numbering resources without regard to utilization rate.

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<sup>8</sup> See *id.* at ¶¶189, 191, 241

**B. Utilization Thresholds Must Be Two-Tiered To Distinguish Between New Entrants And Carriers With A Market Presence Of Three Or More Years.**

Any utilization threshold that the FCC adopts must reflect the critical differences between new entrants and carriers that have been operating in a market for more than three years. For example, most carriers who have been in a market for more than three years have a larger overall quantity of numbers than those who have been operating in the market for three or less years. If the FCC requires all carriers to meet the same utilization rate before requesting a growth code, incumbent carriers that have a greater overall quantity of numbers will have a larger inventory of available numbers when they reach the utilization threshold than new entrants. This will give the incumbent carriers an insurmountable advantage over new entrants for the reasons explained above. Consequently, Winstar recommends a “two tier” utilization rate. Carriers that have had a presence for three years or less in the relevant rate center should be required to meet a lower utilization rate. Carriers that have had a presence for more than three years should be required to meet a higher utilization rate. Winstar’s suggested approach is consistent with the FCC’s effort to require a utilization rate that is “totally neutral.”<sup>9</sup> By contrast, the FCC’s tentative conclusion would in certain circumstances prevent carriers from obtaining additional numbering resources despite a legitimate need, and would be unfairly prejudiced against smaller carriers and new entrants in favor of large and incumbent carriers.

**C. The Utilization Formula Must Be Amended Or the Utilization Threshold Must Be Lowered.**

Despite the FCC’s assertion that it would only adopt a utilization rate that is “totally neutral,”<sup>10</sup> it has reached the tentative conclusion “that a nationwide utilization threshold

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<sup>9</sup> *Id.* at ¶219.

<sup>10</sup> *Id.*

for growth numbering resources should be initially set at 50% . . . increas[ing] by 10% annually until reaching 80%.”<sup>11</sup> Requiring small carriers and new entrants to meet an initial fill rate of 50% appears to place small and new entrants on the same track to compete as large and incumbent carriers. In reality, though, it unfairly solidifies the large and incumbent carriers’ head start because of their overwhelming control of the numbering resource.

Winstar believes that the FCC must either modify the formula for calculating utilization rates or lower the utilization threshold to take into account the distortions created by the formula adopted in the *Report and Order*. The current calculation fails to account for differences in the ways that certain types of carriers and services utilize numbering resources. As such, it is inherently discriminatory, and could prevent some carriers from obtaining numbering resources they legitimately need.

In order to create a competitively neutral threshold, the FCC must ensure that the requirement to achieve a utilization threshold does not unfairly impact small and new entrants as compared to larger and incumbent carriers. The utilization formula must be clear, consistent and fully take into account the amount of control that carriers have over certain types of numbers. Therefore, Winstar urges the FCC to amend the utilization calculation so that all numbers over which a carrier has little or no control and which are unavailable for assignment to end-users are included with *assigned numbers* in the numerator, which is then divided by a denominator that includes the total quantity of telephone numbers in all NXXs assigned to the carrier within the relevant rate center. Specifically, the utilization threshold should be calculated by including those numbers from the administrative, aging, intermediate and reserved number

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<sup>11</sup> *Id.* at ¶238.

categories with assigned numbers in the numerator. The amended formula would be as follows:

$$N / D \times 100 = \text{Utilization Threshold}$$

Where

N = administrative, aging, assigned, intermediate and reserved numbers

D = total quantity of telephone numbers in all NXXs assigned to the carrier within the relevant rate center.

This utilization formula more accurately reflects the way that carriers use numbers, as well as end users' expectations for the administration of numbers, and simplifies a carrier's accounting process. The mandatory reporting requirements will prevent carriers from improperly categorizing numbers, because the FCC, in cooperation with the NANPA and state commissions, will be able to compare each carrier's numbering use with all of the other carriers in the same rate center and investigate unusual numbering usage patterns.

If the FCC does not amend the utilization formula as Winstar recommends, it must lower the utilization thresholds below 50%. As the FCC acknowledged, most of the suggested utilization thresholds submitted by commenters may not have utilized the same calculation method.<sup>12</sup> In its initial comments, Winstar proposed a two-tier plan in which utilization rates for new entrants would be less stringent than those imposed on incumbents.<sup>13</sup> Specifically, Winstar recommended a utilization threshold of 40% increasing to 60% after a carrier had been present in the rate center for three years, because this two-tiered threshold more evenly distributes a responsible utilization threshold among various types of carriers without

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<sup>12</sup> *Id.* at ¶15 ("We believe, however, that most of the suggested utilization thresholds included in the numerator were based on additional categories besides *assigned numbers*.").

<sup>13</sup> *In re* Numbering Resource Optimization, *Comments of WinStar Communications, Inc.*, 36-38 (July 30, 1999).

creating a competitive disadvantage for any one set of providers. Under the current utilization formula, however, a 60% utilization threshold may be too high.

If the FCC adopts a flat 50% threshold that rises to 80% for all carriers, new entrants and smaller carriers will not be able to obtain and hold blocks of numbers necessary to comply with the design of most medium to large business' PBX, Centrex and Communications Server equipment that requires Direct Inward Dialing. This equipment requires the assignment of sequential blocks of 20 to 1,000 numbers, beginning with numbers that end in "0", "00" or "000." Because the sequential assignment requirement prevents carriers from assigning numbers out of order, medium and large customers will be deprived of the telephone numbers essential to operate their businesses, and smaller and new carriers may be less able to satisfy customer requests than would large and incumbent operators.

**D. Utilization Thresholds Must Be Rate Center-Based.**

Utilization rates must be calculated on a rate center basis, and only on a rate center basis, for as long as rate centers continue to be the standard for NXX code assignment. In the *Report and Order* the FCC tentatively concluded on setting "a *nationwide* utilization threshold for growth numbering resources . . . [and] [a]dditionally, propose[d] to require carriers to meet a *specific rate center-based* utilization threshold for the rate center in which it is seeking additional numbering resources."<sup>14</sup> It is unclear to Winstar whether the FCC has tentatively concluded that it will rely on a carrier's overall, nationwide-based utilization rate, its rate center-based utilization rate or a combination of both to determine when the carrier is eligible to receive additional numbering resources. In any event, Winstar submits that the FCC must adopt a

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<sup>14</sup> *Report and Order* at ¶248 (emphasis added).

method that includes a utilization threshold for the rate center in which a carrier is seeking additional numbering resources.

If the FCC relied upon a nationwide utilization rate to assess applications for growth codes, it would provide a powerful disincentive for a carrier to enter MSAs or rate centers with small population densities or large concentrations of residential customers because they might lower the carrier's nationwide utilization rate and harm its chances of obtaining growth codes in higher density areas. Since the ultimate goal of the 1996 Act is ubiquitous competition, the only fair and proper method to assess utilization is on a rate center-basis.

**E. Utilization Thresholds Should Not Vary From State to State.**

The FCC also seeks further comment on “whether state commissions should be allowed to set rate-center based utilization threshold[s] within this range based on criteria [it] establish[es].”<sup>15</sup> Winstar opposes any additional grant of authority to state commissions to set a rate-center based threshold, regardless whether the range is first established by the FCC. State commissions presently have effective means to monitor the efficient use of numbering resources in rate centers. State commissions, for example, may reclaim numbers that have not been assigned within six months. No further grant of authority to state commissions is necessary, and any such grant may ultimately frustrate or confuse carrier efforts to meet the requirements of the FCC's rules as adopted in the *Report and Order*.

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<sup>15</sup> *Id.*

## **II. THE FCC SHOULD REQUIRE NON-LNP-CAPABLE CARRIERS TO IMPLEMENT POOLING AS SOON AS THEY BECOME LNP-CAPABLE**

In its *FNPRM*, the FCC asked for further comment on “whether covered CMRS carriers should be required to participate in pooling immediately upon expiration of the LNP forbearance period on November 24, 2002, or whether a transition period beyond that date to implement pooling will be necessary and, if so, what length of that transition period should be.”<sup>16</sup> In its earlier comments, Winstar expressed its belief that the current grant of CMRS forbearance from pooling was both unnecessary and discriminatory in favor of the CMRS industry segment. The fact remains that for years, the CMRS industry administered its numbers in blocks of 1000 because they received numbers that way from the ILECs and their Code Administrators. It is difficult to believe that equipment that is more technologically advanced than that used 20 years ago and substantially similar to the equipment utilized today by ILECs and CLECs would be incapable of supporting administration by thousands blocks. Although our position in this matter has not changed, we recognize the authority of the FCC to rule in this regard and the likely possession of information by the FCC to which we are not privy. For this reason we shall not further question the existing grant of forbearance. Nonetheless, we must contend, in the strongest possible terms, that any further delay is unnecessary at best and outrageously discriminatory at worst.

The original purpose for the grant of forbearance was to give the CMRS industry sufficient time to bring their equipment into compliance with LNP standards. Considering that the entire wireline industry was able to accomplish the deployment of LNP, including the selection of two Number Portability Administrators and the subsequent replacement of one of

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<sup>16</sup> *Id.* at ¶249.

them, in less time than the CMRS industry has been granted in the forbearance, any further grant of “transition time” would seem to be totally without merit. We feel that it is important to remind the FCC that the transition time granted to wireline carriers was for the transition from Interim Number Portability to state of the art LNP. This transition did require significant technical and personnel resources on the part of the Incumbent Carriers, CLECs, and the Number Portability Administration Center (“NPAC”). Even so, once the NPAC was ready, these transitions were accomplished wholesale in 60 to 90 days. The CMRS industry has been granted 3 years to prepare. Finally, it is important to note that the only reason that wireline carriers required or were granted any transition time whatsoever was the deployment of Interim Number Portability. The CMRS industry has never, until now, engaged in number portability of any kind. Hence, there is no technology transition necessary.

The Wireless Wireline Integration Subcommittee (“WWISC”) of the Local Number Portability Administration Working Group (“LNPA-WG”) has worked diligently to bring about the necessary policies and technical specifications to meet the June, 2002 date and has not suggested any further technical reason for delay. Hence, we believe that the FCC should compel the CMRS industry to adhere to the original June, 2002 date with no further transitions or delays introduced into the process.

### **III. THE FCC HAS NO AUTHORITY TO AUCTION NUMBERS, AND AUCTIONS WOULD NOT IMPROVE EFFICIENCY**

In the *FNPRM*, the FCC seeks further comment on “how a market-based allocation system would affect the efficiency of allocation of numbers among carriers.”<sup>17</sup>

Winstar continues to oppose vigorously any form of “pricing for numbering resources,”<sup>18</sup> as did

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<sup>17</sup> *Id.* at ¶241.

<sup>18</sup> *Id.*



the majority of commenters who responded to the *Notice of Proposed Rulemaking* in this proceeding.<sup>19</sup> Not only are “market-based allocation” systems – auctions – contrary to the plain language of the 1996 Act, they are also inconsistent with the FCC’s goal of “ensur[ing] that all carriers have the numbering resources they need to compete.”<sup>20</sup> Perhaps more importantly, however, auctions would have little to no effect on the efficiency with which numbering resources are utilized, yet they would create enormous administrative burdens and have the potential unnecessarily to raise the costs of telecommunications services for end users. Winstar urges the FCC to rely instead on the numbering optimization measures it has adopted in this proceeding.

**A. Congress Has Not Authorized The FCC To Auction Numbering Resources.**

Put simply, the FCC does not have statutory authority to auction numbering resources or to adopt any sort of charge for numbers. Requiring payment for numbering resources is inconsistent with the plain language of the 1996 Act. Section 251(e)(2) provides that *all* telecommunications carriers must bear the *cost* of establishing numbering administration arrangements on a competitively neutral basis.<sup>21</sup> Although the FCC has discretion to establish the “cost” of establishing numbering administration arrangements, it cannot require carriers to pay any charges or fees that exceed those costs.

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<sup>19</sup> See, e.g., Ameritech Comments at 53-57; AT&T Comments at 61-63; Bell Atlantic Comments at 6-7; Choice One and GST Comments at 5; GTE Comments at 60-63; Liberty Comments at 6; MCI WorldCom Comments at 48-50; NEXTLINK Comments at 21-24; Omnipoint Comments at 31-34; Qwest Comments at 6-7; Time Warner Comments at 22-23; USTA Comments at 12; WinStar Comments at 38-41.

<sup>20</sup> *FNPRM* at ¶1.

<sup>21</sup> “Costs.--The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.” 47 U.S.C. § 251(e)(2).

Auctions would not, and indeed could not, assist the FCC in determining the “cost” of establishing numbering administration arrangements. The price that a carrier would pay for numbering resources would be determined by a number of factors, including its need for numbers or its desire to prevent competitors from obtaining needed numbers, none of which relates to the cost of the numbering administration arrangement itself. If auction revenues exceeded the cost of the numbering administration arrangement, the auction would be unlawful under the 1996 Act regardless whether the revenues offset other funds to which some carriers contribute. If the revenues fall short of the cost of the numbering administration arrangement, the auction would not serve the purpose for which the FCC proposed it, because it would not create adequate incentives for carriers to use numbering resources efficiently. Perhaps more importantly, the auction would have failed to determine the “cost” of “establishing numbering administration arrangements.”

Winstar strongly objects to the FCC’s suggestion that auctions would be appropriate to identify and recover the “societal costs of eventual NANP exhaust.”<sup>22</sup> First, the FCC has no authority to identify the “societal costs of eventual NANP exhaust” and require carriers to pay these costs in order to obtain numbering resources. Rather, the FCC’s authority is explicitly limited to determining the cost of establishing numbering administration arrangements and ensuring that all telecommunications carriers bear these costs on a competitively neutral basis. Second, the revenues collected through auctioning numbering resources would have no rational relationship to the “societal costs of eventual NANP exhaust.” The “societal costs of eventual NANP exhaust” theoretically would include, at a minimum, the costs of updating equipment and software, educational campaigns, and replacement of any stationery, signage or

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<sup>22</sup> Notice at ¶234.

other items containing outdated dialing information. In contrast, the factors that would determine the price a carrier pays during an auction for numbering resources relate solely to that individual carrier's need for numbering resources, or its desire to prevent the resource from falling into the hands of a competitor. Consequently, auctions would not be an appropriate mechanism for determining the "societal costs of eventual NANP exhaust" even if the FCC had the statutory authority to mandate such measures.

The 1996 Act also requires that the cost of "numbering administrative arrangements" be distributed among "all" carriers.<sup>23</sup> Under an auction mechanism, however, carriers who do not participate in the auction would not contribute to the recovery of costs for numbering administrative arrangements, in direct contravention to the plain language of section 251(e)(2).<sup>24</sup> The FCC certainly cannot force carriers who do not need additional numbering resources, or who can obtain numbers from other carriers, to compete in auctions. In any event, the costs of "numbering administrative arrangements" would not be distributed among all carriers. This result cannot be reconciled with the explicit requirements of section 251(e)(2).

Further confirmation that the auction of numbering resources is inconsistent with the 1996 Act can be found in the international context. The FCC has no authority over carriers in the other seventeen member nations of the North American Numbering Plan ("NANP"), which includes the United States, Canada, and several Caribbean countries. Therefore, the FCC would be unable to determine how the proceeds raised from foreign carriers could be used or, for

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<sup>23</sup> 47 U.S.C. § 251(e)(2).

<sup>24</sup> *Id.*

that matter, whether these other carriers could be compelled to pay for numbering resources, whether by auction or any other method.<sup>25</sup>

In addition to its inconsistency with the plain language of Section 251(e)(2), auctions of numbering resources cannot be reconciled with the 1996 Act's broader goals of fostering competition and creating incentives for new market entrants. Auctions of numbering resources would amount to a *de facto* discriminatory practice against certain types of services and carriers. For example, services or technologies that generate higher gross or net margins, such as business or digital PCS services, will support a higher cost per number than lower margin services, such as residential or wireline services. Therefore, carriers providing business or digital PCS services will more easily be able to fund the acquisition of additional numbering resources and absorb the associated costs than carriers providing residential or wireline services. Similarly, large carriers, who typically have greater financial resources, will have a greater ability to fund numbering resources and absorb the related costs. The same is true for carriers that have been in the market for a longer period of time, because they will have a larger overall inventory of numbering resources from which they can use numbers without participating in auctions, as well as a larger customer base and revenue stream to fund acquisitions of numbering resources, than smaller carriers or new entrants. For the same reasons, larger end users will be able to absorb the additional cost of service caused by auctions of numbering resources than smaller end users. Therefore, implementation of auctions for numbering resources is contrary to

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<sup>25</sup> See, e.g., *Toll Free Service Access Codes*, Fourth Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 9058, ¶16 (1998) ("Because the Commission has no authority over subscribers in other countries, it would be unable to dictate what entity should receive auction proceeds when toll free subscribers in other countries are involved.").

the FCC's goal to "ensure that no class of carrier or consumer is unduly favored or disfavored by [its] optimization efforts."<sup>26</sup>

**B. Auctioning Numbering Resources Would Not Improve The Efficiency With Which Carriers Utilize Numbering Resources.**

In addition to the insurmountable legal barriers that prevent the auction of numbering resources, the ineffectiveness of auctioning numbering resources requires that the FCC reject it as an optimization measure. To be effective, a numbering optimization measure must directly address the causes of inefficient number utilization. As the FCC itself has recognized, inefficient numbering utilization is the result of (1) multiple rate centers and the competitive need of most carriers to have at least one NXX code per rate center, (2) the allocation of numbers in 10,000 blocks, and (3) the absence of control over requests for numbering resources. Auctions do not address any of these causes of inefficiency. Even if numbers are auctioned, (1) under the terms of the order, the quantity of rate centers will remain the same and carriers will continue to need at least one NXX in each of them, (2) numbers will continue to be allocated in 10,000 blocks, and (3) there will still be no control over requests for numbering resources. Far from addressing these causes of inefficiency, auctions would merely result in carriers obtaining additional numbering resources on the basis of financial strength rather than legitimate need.<sup>27</sup>

Auctions could actually have a negative effect on efficiency because they would increase incentives for carriers to hoard numbers, and would thereby interfere with the FCC's reclamation

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<sup>26</sup> *FNPRM* at ¶3.

<sup>27</sup> *See also Toll Free Access Codes*, 13 FCC 9058 at ¶16 (finding that auctions are not likely to lead to an orderly or efficient allocation of toll free vanity numbers, and that the practical difficulties would outweigh any efficiencies produced).

procedures. Any measure that increases the cost, delay or difficulties that a carrier faces when requesting additional numbering resources increases the incentives for carriers to hoard existing numbering resources. Not only would auctioning increase the incentives for carriers to hoard numbers by increasing the cost and uncertainty associated with obtaining additional numbering resources, it would imply that carriers own the numbers that they have purchased through an auction. This would imply that a carrier who has purchased numbers through an auction need not return these numbers, even if they remain unused. The combination of the increased incentives to hoard and the implied ownership of numbers obtained through auctions would certainly decrease the overall efficiency with which carriers utilize numbering resources.

Winstar urges the FCC to allow the rules it adopted in the *Report and Order* to take effect before considering additional, untested numbering optimization measures, particularly drastic measures like auctions of numbering resources. For example, the FCC should first observe the effect that the uniform national definitions and mandatory reporting requirements will have on the efficiency with which carriers utilize numbering resources. The FCC should also determine whether the new measures for verification of the need for numbering resources and reclamation of unused numbers are effective, not to mention the implementation of mandatory number pooling. These measures, which already represent a fundamental change in numbering administration, should be allowed to operate for a sufficient length of time so that the FCC can judge their effectiveness before considering additional optimization measures that are untested. However, the FCC need not delay the implementation of proven optimization measures like rate center consolidation and mandatory ten-digit dialing, because the beneficial effect of these measures is documented and would not interfere with any of the current rules.

Auctioning numbering resources will only interfere with the effectiveness of the new rules that the FCC adopted in the *Report and Order*. The FCC's current rules are based on the

idea that numbers are a public commodity which cannot be owned and have no intrinsic value: Numbers simply facilitate access to valuable telecommunications and information services. Thus, the FCC's rules and industry guidelines seek to eliminate incentives to possess unused numbers and prohibit carriers from selling or otherwise brokering numbers.<sup>28</sup> By contrast, auctions are based on the idea that the auctioned resource is intrinsically valuable. Auctions of numbering resources would create incentives for the formation of, and facilitate the participation in, a secondary numbering market in which carriers buy and sell unused numbering resources.<sup>29</sup> These two fundamental ideas cannot be reconciled. The FCC must either reject the idea of auctioning numbering resources and continue to enforce its current numbering policies and rules, or it must repeal all of its current numbering policies and rules if it auctions numbering resources. The correct choice is clear given that the FCC lacks the statutory authority to implement number auctions: The FCC must reject the idea of auctions for numbering resources.

The FCC should also consider that telephone numbers have no intrinsic value other than enabling convenient access to a telecommunications service. Unlike wireless spectrum, the universe of numbers, with format adjustments for expansion, is theoretically infinite. Despite the present and pressing need to conserve numbers to avoid the costs of expanding the NANP, which Winstar supports, technology may evolve in the time afforded by the FCC's new rules that permits a cost-effective expansion of the NANP. Rather than delay the ultimate exhaustion of

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<sup>28</sup> See, e.g., *North American Numbering Plan Administration*, Report and Order, 11 FCC Rcd 2588, 2590, ¶4 (1995) (finding that numbers are a public resource and are not the property of carriers); INC Central Office Code (NXX) Assignment Guidelines, INC 95-0407-008, Section 2.1 ("The NANP resources are considered a public resource and are not owned by the assignees or the [numbering administrator]. Consequently, the resources cannot be sold, brokered, bartered, or leased by the assignee for a fee or other consideration. If a resource is sold, brokered, bartered, or leased for a fee, the resource is subject to reclamation by the [numbering administrator]."); INC Thousands Block Pooling Assignment Guidelines, INC 99-0127-023, Section 2.3 (same).

<sup>29</sup> See also *Toll Free Access Codes*, 13 FCC 9058 at ¶16 (concluding that lotteries and auctions would encourage brokering and manipulation of the system).

numbers, auctions would only incite carriers to purchase and accumulate an inventory of numbers to gain a competitive advantage when the ultimate need to expand the NANP arrives. Thus, the FCC should rely on the added efficiency that the FCC's new rules may realize to calm the numbering shortage rather than engage in the uncertainty of an auction process that may, and we believe will, have the opposite effect.

In addition, the FCC must fully take into account the administrative requirements and other costs associated with auctioning numbers to carriers who are unfamiliar with the FCC's auction processes.<sup>30</sup> At the very least, auctions would likely delay the process for issuing numbers, increase the administrative burdens on the FCC, the NANPA and carriers, and result in significantly higher service costs.<sup>31</sup> The FCC would also have to implement a maze of accounting procedures and rules to monitor compliance and ensure coordination with an administrative database. Aside from increasing the costs to the FCC to oversee numbering, carriers would pass the added costs of auctions to customers. The FCC should focus instead on the implementation and enforcement of the new numbering rules and the implementation of mandatory ten-digit dialing and further rate center consolidation.

Finally, considering the increased cost carriers would have to absorb in an auctioning environment – that may or may not be otherwise offset by decreased contributions to universal service and TRS programs<sup>32</sup> – auctions may have the ultimate affect of keeping competitive carriers from entering the market altogether. Although auctions would significantly increase the

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<sup>30</sup> *Id.* at ¶3 (“[I]n implementing the optimization measures discussed herein we seek to . . . impose the least societal cost possible, and ensure competitive neutrality, while obtaining the highest benefit . . .”).

<sup>31</sup> *See, e.g., Toll Free Access Codes*, 13 FCC 9058 at ¶16 (finding that auctions are difficult to administer and would likely result in the delay in the issuance of numbers).

<sup>32</sup> *FNPRM* at ¶241.



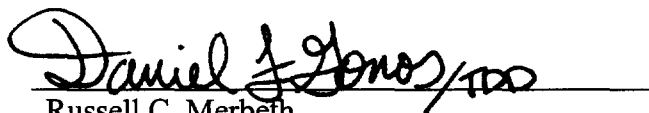
cost of entering a market, they would not reduce the quantity of numbers that the new entrants would be forced to request. Auctions would instead be another tool used by incumbent carriers to discourage competitive carriers from entering or expanding their presence in a market by bidding up the auction price to as high a level as possible. It is beyond dispute that one effective way to gain a competitive advantage over a nascent competitor is to restrict the availability of essential components or resources. Moreover, it would be difficult to determine whether a deep-pocketed carrier is obtaining numbering resources based on its own needs or on its desire increase the costs of its competitors. These results are fundamentally inconsistent with the pro-competitive goals of the 1996 Act and should be rejected without further consideration.

**CONCLUSION**

For these reasons, Winstar respectfully submits that the FCC should adopt measures proposed in the *FNPRM* only in accordance with the foregoing comments.

Respectfully submitted,

**WINSTAR COMMUNICATIONS, INC.**

A handwritten signature in black ink, appearing to read "Daniel F. Gonos", is written over a horizontal line.

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DATED: May 19, 2000

## CERTIFICATE OF SERVICE

I, Kathleen T. Peacock, do hereby certify that on this 19<sup>th</sup> day of May 2000, a copy of the foregoing was served, by hand delivery, to the parties listed below:

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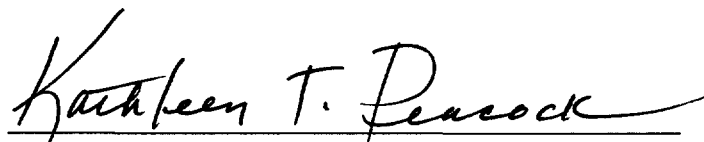
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